## DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

### Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

HARMAN *v.* MOSS et al.

Sept. 20, 1917.

[93 S. E. 609.]

**1. Tenancy in Common (§ 31*)—Sale—Cotenant as Agent—Compensation.**—Defendant, who effected a sale of timber on lands owned in common with complainants, the sale being a special one and involving a sale of other properties, is entitled to greater compensation than an ordinary broker, and where defendant's situation and qualification for making the sale were exceptional, an allowance of 10 per cent. commissions is reasonable.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 122.]

**2. Tenancy in Common (§ 37*)—Sales—Proceeds—Accounting.**—Defendant, who, with complainants, was interested in timber lands, effected a sale of the timber, at the same time giving the grantee a right of way over his own lands. The sale could not have been effected but for the conveyance of the right of way, and the property was sold for a lump sum. Held, that under such circumstances defendant was entitled to receive out of the purchase money the price at which under the circumstances he could reasonably have expected to sell the right of way in connection with the sale of his interest and other interests, and the condemnation value of the right of way independent of its acquisition by the purchaser of the timber is not the proper measure of complainants' recovery.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 135.]

**3. Tenancy in Common (§ 38 (8)*)—Sale—Cotenant as Agent—Accounting—Conflicting Interests of Agent.**—In a suit between complainants who owned interests in lands, and defendant, a cotenant who effected a sale of the timber thereon, evidence held to show that defendant's conveyance of his asserted adverse title to and interest in the lands entered into the price, and that the purchaser would not have bought but for defendant's conveyance of his asserted title, which at all events amounted to a cloud on the title to the land.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 135.]

**4. Tenancy in Common (§ 38 (8)*)—Actions—Burden of Proof.**—In such case, where there was a controversy over the amount which complainants were to receive, defendant, before he is entitled out

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

of the purchase price to compensation for the conveyance of his alleged title, must show by preponderance of the evidence that such title had some definite value.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 135.]

**5. Tenancy in Common (§ 38 (8)*)—Compensation—Actions—Evidence.**—In a suit between complainants who owned interests in lands and defendant, a cotenant who sold the timber thereon and who asserted an adverse title to a portion of the premises, evidence held to warrant a finding that $1,000 of the purchase price, which was paid in a lump sum, represented defendant's conveyance of his title.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 135.]

**6. Tenancy in Common (§ 33*)—Sale of Property—Compensation—Right to.**—Complainants, who owned interests in land in common with defendant entered into a contract which authorized defendant to buy or sell the timber at $10 an acre. Defendant also asserted an adverse interest in the land. Defendant sold the timber for a large sum, but, believing that he occupied the relation of an optionee purchaser and had the right to sell the timber and retain the purchase money over $10 per acre, did not disclose the fact that he received a greater price, in fact representing that he disposed of the timber for $10 an acre. It further appeared that defendant guaranteed the title to the purchaser, and that he was entitled, under a lease of the coal, to certain timber rights which he surrendered. Held, in view of defendant's claims, he was not guilty of fraud or bad faith precluding him from recovering compensation for making the sale.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 122.]

**7. Appeal and Error (§ 172 (1)*)—Presentation of Grounds of Review in Court Below—Necessity.**—Where the bill in the court below expressly stated that defendant was entitled to reasonable commissions for effecting the sale of timber lands in which complainants were also interested, the point that defendant should not have received commissions because of his misrepresentations and bad faith cannot, by assignment, be raised on appeal.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 557.]

**8. Costs (§ 32 (1)*)—Reference—Liability.**—Where, on reference to a commissioner in the court below, complainants substantially prevailed, the costs of the reference should be imposed against the defendant.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 100; 3 Va.-W. Va. Enc. Dig. 608.]

Appeal from Circuit Court, Tazewell County.

Suit by Virginia A. Moss and another against W. F. Harman,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

who filed a cross-bill. From a decree which denied part of the relief sought, defendant appeals, and complainants assign cross-errors. Amended and affirmed.

*Graham & Hawthorne,* of Tazewell, *W. B. Kegley,* of Wytheville, and *S. M. B. Coulling,* of Tazewell, for appellant.

*Henson & Bowen,* of Tazewell, for appellees.

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BARSA *v.* KATOR.

Sept. 20, 1917.

[93 S. E. 613.]

**1. New Trial (§ 108 (3)*)—Newly Discovered Evidence—Grounds.**—In assumpsit to recover a balance claimed by plaintiff upon a settlement of accounts growing out of numerous transactions, it appeared that plaintiff, who was a peddler, for which business defendant furnished him goods, had made numerous small payments. On trial, defendant contended that after the settlement plaintiff took from his home goods to a large value, which plaintiff denied. Defendant's only testimony was given by himself and another that plaintiff took two or three loads of goods from defendant's house when he moved. After a verdict for plaintiff, defendant moved for new trial for newly discovered testimony that several witnesses saw plaintiff taking goods from defendant's house after they severed business relations, and there was further testimony that defendant stated he had about $1,000 worth of goods, and that he ought to set up a store. Defendant filed an affidavit that he could not by the exercise of reasonable diligence have learned of such evidence before trial. Held that, as reasonable diligence on the part of the movant could not have secured the evidence at the former trial, and it is material, and not merely cumulative and collateral, and should produce a different result, and goes to the merits, the new trial should have been granted; the evidence falling within all the rules.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 447-451, cited by the court.]

**2. New Trial (§ 102 (3)*)—Newly Discovered Evidence—Diligence.**—Though one of the witnesses as to plaintiff's removal of the goods, whose testimony was alleged to be newly discovered, was a relative of defendant, living about 30 miles from the place of trial, yet where such witness had for nearly a year prior to trial been without the state, the case having been pending for over two years, defendant's failure to produce the testimony at trial does not show want of diligence.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 448.]

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